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K-ZAQ (M) Sdn Bhd v Johnson Matthey Public Ltd & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1835 OF 2009

B

RAMLY ALI, ZAHARAH IBRAHIM JJCA AND HAMID SULTAN J
13 MARCH 2013

C

Contract — Joint venture — Joint venture agreement — Setting up of business — Restrain from doing certain acts contrary to joint venture agreement — Shares transferred to first respondent and/or nominees — Company established under JVA required financial support — Dispute regarding increment in share capital — Bank loan — Whether bank loan could be borrowed — Appeal against decision of High Court — Whether finding of facts misconceived — Whether lacked judicial appreciation of facts and law

D

The first respondent planned to set up business in Malaysia and proceeded to approach HICOM Bhd. The parties then entered into a joint venture agreement ('JVA') and as a result, the fourth respondent was established. The parties agreed to restrain from doing certain things contrary to the JVA as long as the first respondent, HICOM and the appellant or their respective subsidiary companies continued to be the registered holders of any shares. With the consent of the petitioner, the respondent's shares were transferred to the first respondent and/or nominee(s). The second and third respondents were the nominees of the first respondent. Dispute arose when the appellant disagreed to increase in the share capital to assist the fourth respondent which needed financial support to operate as it was the appellant's contention that it could be done by borrowing from the bank. However, the first respondent argued that loan facilities could not be obtained without their guarantees. The appellant complained that subsequent increase of the share holding had placed their position in disadvantage and was not within the spirit and intent of the JVA. Offers to purchase the shares were also not acted upon by the appellant. The High Court dismissed the petition and hence, the present appeal. The appellant argued that the finding of facts of the learned judge were misconceived, based on lack of judicial appreciation of the facts and the law, and accordingly, plainly wrong.

E

F

G

H

Held, dismissing the appeal with costs:

I

(1) The JVA which the petitioner relied upon to sustain the complaints throughout the petition under s 181 of the Act was a non-starter as the JVA ceased to bind the parties upon HICOM, one of the original share holders who had transferred the shares to the first respondent and/or

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their nominee(s) with the consent and approval of the petitioner and that consent was sustained not only in the seventh board meeting but also the eighth (see para 5(a)).

(2) Before the presenting of the petition, there was evidence to show that the petitioner had filed a writ action seeking for specific performance of the purchase of its shares by the first respondent for 1m British Pounds pursuant to an agreement. That writ was struck out without being served. Subsequent to the writ, the petitioner had filed the petition to achieve the same purpose as that of the writ. This might attract the jurisprudence relating to collateral purpose and/or conduct and/or bad faith which would tantamount to abuse of process requiring the court to dismiss the petition (see para 5(b)).

(3) The lack of judicial appreciation operating from facts relating to s 181 petition did not mean the fact that the learned judge had accepted the evidence favouring the respondents' contention and had rejected the appellant's version as a ground for judicial interference on the grounds it was plainly wrong. As long as the relevant issues had been placed before the learned judge and the judgment reflected that the learned judge had taken cognizance of the relevant issues notwithstanding the judgment did not deal with every aspect of the evidence in detail or meticulous detail, and the learned judge had directed his mind to the relevant issues, and had acted in accordance with the law and the decision passed the test of reasonableness, the finding of facts relating to physical facts would not be ordinarily disturbed notwithstanding the judgment was brief and direct to the point (see para 8).

(4) It would not be in order to entertain an appeal on the allegation of finding facts because of the assertion that there was lack of judicial appreciation anchored with argument that the decision was plainly wrong with a view to make a rear entry to the well established principle on judicial restraint on finding of facts, in the pretext that the decision was plainly wrong or perverse for lack of judicial appreciation when the issues had been dealt with by the High Court (see para 8).

(5) The court, taking into consideration the totality of the evidence and the conduct of the appellant held that the learned judge has not misdirected as averred in the memorandum of appeal to justify appellate intervention. In the instant case, the court was satisfied that the learned judge had directed his mind to the relevant issues and had acted in accordance with the law and the decision passed the acid test of reasonableness (see para 10(e)).

[Bahasa Malaysia summary

Responden pertama merancang untuk memulakan perniagaan di Malaysia dan telah meneruskan untuk mengusulkan kepada HICOM Bhd. Pihak-pihak

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memeterai satu perjanjian usaha sama ('PU') dan hasilnya, responden keempat telah diwujudkan. Pihak-pihak bersetuju untuk mengelakkan daripada melakukan beberapa perkara yang bertentangan dengan PU selagi responden pertama, HICOM dan perayu atau syarikat subsidiari masing-masing terus menjadi pemegang syer berdaftar. Dengan kebenaran pempetisyen, syer-syer responden dipindah milik kepada responden pertama dan/atau penamanya. Responden kedua dan ketiga merupakan penama-penama responden pertama. Pertikaian timbul apabila perayu tidak bersetuju untuk meningkatkan modal syer untuk membantu responden keempat yang memerlukan bantuan kewangan untuk beroperasi kerana adalah menjadi hujahan perayu bahawa ia boleh dilakukan dengan meminjam daripada bank. Walau bagaimanapun, responden pertama menghujahkan bahawa kemudahan pinjaman tidak boleh didapati tanpa jaminan-jaminan mereka. Perayu mengadu bahawa peningkatan selanjutnya pemegangan syer telah meletakkan mereka dalam kedudukan yang merugikan dan bukan dalam objektif dan maksud PU. Tawaran-tawaran untuk membeli syer-syer juga tidak diendahkan oleh perayu. Mahkamah Tinggi menolak petisyen dan dengan itu, rayuan ini. Perayu menghujahkan bahawa dapatan fakta hakim adalah satu salah anggap, berdasarkan ketiadaan pertimbangan kehakiman ke atas fakta dan undang-undang dan dengan itu, jelas salah.

Diputuskan, menolak rayuan dengan kos:

(1) PU yang disandarkan oleh pempetisyen untuk menyokong aduan dalam petisyen di bawah s 181 Akta bukan permulaan kerana PU tidak lagi mengikat pihak-pihak apabila HICOM, sebagai salah satu pemegang syer asal yang telah memindahkan syer-syernya kepada responden pertama dan/atau penamanya dengan kebenaran dan kelulusan pempetisyen dan kebenaran tersebut dikekalkan bukan saja dalam mesyuarat lembaga yang ketujuh tetapi juga yang kelapan (lihat perenggan 5(a)).

(2) Sebelum membentangkan petisyen, terdapat keterangan yang menunjukkan bahawa pempetisyen telah memfailkan tindakan writ memohon bagi pelaksanaan spesifik pembelian syer-syernya oleh responden pertama bagi 1juta Pound British di bawah perjanjian. Writ tersebut dibatalkan tanpa disampaikan. Berikutan writ tersebut, pempetisyen telah memfailkan petisyen untuk mencapai tujuan yang sama dengan writ tersebut. Ini mungkin menarik jurisprudens berkenaan tujuan kolateral dan/atau tindakan dan/atau niat jahat yang akan terjumlah kepada salah guna proses mahkamah untuk menolak petisyen (lihat perenggan 5(b)).

(3) Ketiadaan pertimbangan kehakiman beroperasi daripada fakta berkenaan s 181 petisyen tidak bermaksud fakta bahawa hakim telah menerima keterangan berpihak kepada hujahan responden-responden

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dan telah menolak versi perayu sebagai campur tangan kehakiman atas alasan ia adalah jelas salah. Selagi isu-isu relevan dikemukakan di hadapan hakim dan penghakiman menggambarkan bahawa hakim sedar akan isu-isu relevan tanpa mengira penghakiman tidak menangani setiap aspek keterangan dengan terperinci atau teliti, dan hakim telah mengarahkan mindanya kepada isu-isu relevan dan telah bertindak selaras dengan undang-undang dan keputusan tersebut lulus ujian kemunasabahan, dapatan-dapatan fakta berkenaan fakta fizikal kebiasaannya tidak akan mengganggu walaupun penghakiman adalah ringkas dan tidak berbelit-belit (lihat perenggan 8).

(4) Adalah tidak betul untuk membicarakan satu rayuan atas dakwaan dapatan fakta kerana hujahan bahawa tiada pertimbangan kehakiman yang dikuatkan dengan hujahan bahawa keputusan tersebut adalah jelas salah dengan pandangan bahawa kemasukan lain kepada prinsip matan mengenai kekangan kehakiman ke atas dapatan fakta, dengan alasan bahawa keputusan tersebut adalah jelas salah atau bertentangan atas sebab tiada pertimbangan kehakiman sedangkan isu-isu tersebut telah ditangani oleh Mahkamah Tinggi (lihat perenggan 8).

(5) Mahkamah, mengambil kira keseluruhan keterangan dan tindakan perayu, memutuskan bahawa hakim tidak tersalah arah seperti yang didakwa dalam memorandum rayuan untuk mewajarkan campur tangan rayuan. Dalam kes ini, mahkamah berpuas hati bahawa hakim telah mengarahkan mindanya kepada isu-isu relevan dan telah bertindak selaras dengan undang-undang dan keputusan yang diberikan lulus batu uji kemunasabahan (lihat perenggan 10(e)).]

Notes

For cases on joint venture agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5444–5448.

Cases referred to

A Company, Re [1986] BCLC 362, Ch D (refd)

A Company (No 006834 of 1988), ex parte Kremer [1989] BCLC 365, Ch D (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567, CA (refd)

Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khiun Fui [1978] 2 MLJ 24, FC (refd)

Cumana Ltd, Re [1986] BCLC 430, CA (refd)

Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd (Civil Appeal No J-02(NCVC)(W)-963–05 of 2012) (unreported) (refd)

Dato' Ting Check Sii v Galaxy Grip Sdn Bhd & Ors [2007] 7 MLJ 594, HC refd)

HW Thomas Ltd, Re (1984) 2 ACLC 610, CA (refd)

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Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49, HC (refd)
Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Bing Sung, Re [1978] 2 MLJ 227, PC (refd)
Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)
See Hua Realty Bhd v See Hua News Holding Sdn Bhd & Ors [2007] 7 MLJ 525, HC (refd)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)
Unisoft Group Ltd (No 3), Re [1994] 1 BCLC 609, Ch D (refd)
UEM Group v Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785, FC (refd)

Legislation referred to

Companies Act 1965 ss 31, 152(1), 181

Appeal from: Suit No D1–26–31 of 1998 (High Court, Kuala Lumpur)

Tan Sri Cecil WM Abraham (Rishwant Singh and Farah Shuhadah Razali with him) (Zul Rafique & Partners) for the appellant.
Ira Biswas (Janet Chai Pei Ying and Ong Ee Joe with her) for the respondent.
Loh Siew Cheang (David Hoh, Ng Jack Yee and Andrew Fernandez with him) (Chooi & Co) for the respondent.

Hamid Sultan J (delivering judgment of the court):

[1] The appellant appeals against the dismissal of its petition presented under s 181 of the Companies Act 1965 ('CA 1965'), inter alia, seeking the following prayers namely:

(1) A declaration that the resolution purportedly passed at the Extraordinary General Meeting of the 4th Respondent held on the 16th day of April 1998, and all actions taken in consequence thereof, are null and void.

(2) A declaration that the resolutions purportedly passed at the 9th Board of Directors meeting of the 4th Respondent held on the 16th day of April 1998, and all actions taken in consequence thereof, are null and void.

(3)
(a) A declaration that the purported registration of the 1,800,000 shares in the name of the 2nd Respondent is invalid.

(b) A declaration that the purported registration of the 1,800,000 shares in the name of the 3rd Respondent is invalid.

(c) An order that the register of the members of the 4th Respondent be rectified by removing the names of the 2nd and 3rd Respondent and replacing the same with the name of the 1st Respondent.

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(4) An order that all shares issued pursuant to the resolutions purportedly passed at the Extraordinary General Meeting of the members of the 4th Respondent held on the 16th day of April 1998 and the meeting of the Board of Directors of the 4th Respondent held on the 16th day of April 1998 rectified to reflect the cancellation of the said shares.

(5) An order that the current Articles of Association of the 4th Respondent can be replaced with the Articles of Association of the 4th Respondent that was in place prior to the 16th day of April 1998.

(6) An order that the JV Agreement and the Articles of Association of the 1st Respondent that was in place prior to the 16th day of April 1998 be modified only insofar as is necessary to reflect the fact that HICOM Berhad is no longer a party to the JV Agreement or a shareholder of the 4th Respondent.

(7) Damages to be assessed by the appropriate officer of this Honourable Court.

(8) An order that the shares owned by your Petitioner in the 4th Respondent be purchased by the 1st Respondent for a sum of GBP1,000,000 together with interest thereon at the rate of 20% per annum from the 1st day of January 1998 until the date of full payment.

(9) That the 4th Respondent be would-up and that the Official Receiver be appointed as the Provisional Liquidator of the 4th Respondent.

We heard the appeal on 28 November 2012 and upon hearing we dismissed the appeal on the same day with agreed costs. My learned brother Ramly Hj Ali JCA and my learned sister Zaharah bt Ibrahim JCA have read the draft judgment and approved the same. This is our judgment.

[2] The lengthy memorandum of appeal reflects the issue and problems the learned High Court judge had dealt with inclusive of the issues for appellate consideration, even though all learned counsel were magnimous to state that they will rely on their submission save as to highlight one or two material issues. The said memorandum of appeal, inter alia, reads:

(1) The learned judge erred in deciding that in the circumstances of the case there was no oppression on the Appellant by the 1st, 2nd and 3rd Respondents.

(2) The learned judge failed to appreciate and evaluate the evidence including the contemporaneous correspondence which showed that

(i) The 1st Respondent wanted the Appellant to exit the joint venture;

(ii) The 1st Respondent and the Appellant could not agree on terms during the early discussions;

(iii) When the 1st Respondent and the Appellant finally reached agreement, in Bangkok, Thailand, the 1st Respondent breached this agreement;

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(iv) When HICOM Holdings Berhad ('HICOM') sold its shares in the 4th Respondent to the 1st Respondent, the 1st Respondent divided HICOM's shares between two of its wholly owned subsidiaries (and nominees i.e. the 2nd and 3rd Respondents) in order to overcome the quorum requirements for board of directors meeting and general meetings of the 4th Respondent as laid down by the original Articles of Association of the 4th Respondent.

(v) The Appellant did not agree to the transfer of HICOM's shares in the 4th Respondent to the 1st Respondent or its nominees;

(vi) The 7th Board of Directors meeting of the 4th Respondent on 28.10.1996 finally resolved only to approve the transfer of HICOM's shares in the 4th Respondent to the 1st Respondent or its nominee (and not nominees i.e. the 2nd and 3rd Respondents);

(vii) The 2nd and 3rd Respondents were accustomed to act on the instructions of 1st Respondent whether it came to general meetings or board of directors meetings;

(viii) Soon after the 2nd and 3rd Respondents became registered as nominee shareholders in the 4th Respondent, the 2nd and 3rd Respondents called for the Extraordinary General Meeting ('EGM') of 16.4.1998; and

(ix) It was at the EGM of 16.4.1998 and the 4th Respondent's 9th Board of Directors meeting that the 1st, 2nd and 3rd Respondents wrongfully passed all motions and resolutions which required approval of shareholders holding 85% of the issued and paid up share capital of the 4th Respondent; and

(x) The 1st, 2nd and 3rd Respondent by way of an elaborate and systematic scheme and exclude the Appellant from the management of the 4th Respondent.

(3) Importantly, the learned judge failed to appreciate that the 1st Respondent divided HICOM's 30% share in the 4th Respondent equally between the 2nd and 3rd Respondents in order to create two (2) new shareholders which were accustomed to act on the directions and wishes of the 1st Respondent.

(4) The learned judge failed to appreciate that once the 1st Respondent had the requisite number of shareholders, it called for the EGM of 16.4.1998 in order to put into place the oppressive scheme that would (as it had since the EGM of 16.4.1998) directly resulted in (i) the Appellant being kept out of management of the 4th Respondent; and (ii) a consequent dilution of the Appellant's shareholding in the 4th Respondent.

(5) Having correctly found that the 2nd and 3rd Respondents were the nominees of the 1st Respondent, the learned judge failed to take the necessary further step and appreciate that

(i) The 2nd and 3rd Respondents were accustomed to, and did in fact act in accordance with the wishes and directions of the 1st Respondent at all times;

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(ii) The division of HICOM's shares between the 1st Respondent's two (2) nominees (i.e. the 2nd and 3rd Respondents) was clearly done in order to overcome Article 58 of the 4th Respondent's original Article of Association which required three (3) shareholders to be present at any EGM of the 4th Respondent in order for a quorum to be achieved;

(iii) The references in the Articles of Association and Joint Venture Agreement dated 17.6.1994 (the 'JV Agreement') to a quorum of 3 members, whether at directors meetings or general meetings accordingly was a reference to HICOM, the 1st Respondent and the Appellant.

(6) According, the learned judge fell into grave error when His Lordship entirely failed to appreciate the elaborate scheme put into place by the 1st Respondent in purchasing HICOM's shares in the 4th Respondent, then dividing those shares equally between the two (2) nominee companies that it recently acquired (i.e. the 2nd and 3rd Respondents) and thereafter calling for the EGM of 16.4.1998 and passing certain unlawful resolutions.

(7) Further, the learned judge erred in failing to fully appreciate that the JV Agreement, by its express terms in inter alia Clauses 14 and 27, allowed for and contemplated that the JV Agreement would (and could continue) with any two (2) of the original three (3) shareholders continuing to hold shares in the 4th Respondent.

(8) The learned judge also failed to appreciate that the express terms of the Joint Venture Agreement and the original Articles of Association of the 4th Respondent bound Associated Companies including subsidiaries of the 1st Respondent (i.e. the 2nd and 3rd Respondents).

(9) Although the learned judge recognized the agreement between the 1st Respondent and the Appellant as reflected in inter alia Article 74 of the original Articles of Association of the 4th Respondent and Clauses 5.8, 6.1, 7.3, 12.1, 14, 16.2, 19.3, 26 and 30.12 of the JV Agreement, the learned judge however fell into error in failing to enforce the said agreement.

(10) The learned judge further failed to appreciate that it was agreed between the 1st Respondent and the Appellant by virtue of Clauses 16.2 of the JV Agreement that the 4th Respondent's capital and revenue requirements were first to be sourced from borrowings from banks unless the board of directors of the 4th Respondent determined that such a source was not desirable.

(11) The learned judge further erred in deciding that

(i) Article 74 of the original Articles of Association of the 4th Respondent and Clause 12.1 of the JV Agreement became 'inapplicable' when HICOM ceased to be a shareholder in the 4th Respondent; and

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(ii) The JV Agreement came to an end (and the original Articles of Association of the 4th Respondent ceased to apply) once any one of the original three (3) shareholders of the 4th Respondent ceased to be a shareholder of the 4th Respondent;

(iii) Article 74 of the original Articles of Association of the 4th Respondent (and Clause 12.1 of the JV Agreement) contravened s 152(1) of the Companies Act 1965 when read with s 31 of the Companies Act 1965;

(iv) The transfer of shares from HICOM to the 2nd and 3rd Respondents were not in breach of the original Articles of Association (including Articles 58 and 74) of the 4th Respondent and the terms of the JV Agreement;

(v) The resolutions passed at the EGM of the 4th Respondent on 16.4.1998 and the decisions taken at the 4th Respondent's 9th board of directors meeting were not in breach of the original Articles of Association of the 4th Respondent and the terms of the JV Agreement;

(vi) The fact of and the manner in which the 1st, 2nd and 3rd Respondents proceeded to raise share capital for the 4th Respondent was favourable to and did not prejudice and thereby result in oppression practiced on the Appellant;

(vii) The 1st, 2nd and 3rd Respondents' actions in refusing to recognize and allow the Appellant its right to appoint directors to the board of directors of the 4th Respondent was valid and proper and not in breach of the original Articles of Association of the 4th Respondent and the terms of the JV Agreement;

(viii) The Appellant's shareholding in the 4th Respondent was not wrongfully or unlawfully diluted from 20% to 8%;

(ix) The original Articles of Association of the 4th Respondent had been validly replaced at the EGM of 16.4.1998; and

(x) The EGM of the 4th Respondent on 16.4.1998 was quorate.

(12) Following from the above, the learned judge erred in fact and in law, failed to follow established law and precedent and misapplied the law to the facts in dismissing the Petition and refusing the Appellant relief.

[3] When considering the totality of the evidence, a court hearing an oppression petition under s 181 is bound to take into consideration issues as to abuse whether or not it is articulated in the judgment in extenso. And a petition can be dismissed on grounds of abuse if it is material, independent of s 181 elements (*Re: Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 (refd); *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49 (HC) (refd)). In *Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khiun Fui* [1978] 2 MLJ 24, Lee Hun Hoi CJ observed:

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Quite apart from and independent of all specific practice rules, the High Court has an inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to it satisfaction to be vexatious or oppressive, or to constitute an abuse of it process.

[4] The key elements of s 181 relating to oppression of affairs of the company or the powers of the directors being exercised can be summarised as follows: the act complaint of is (a) in a manner *oppressive* to the petitioner as a member; or (b) in *disregard of the interests* of the petitioner as a member; or that the some act of the company has been done or resolution passed which (i) unfairly discriminates against the petitioner as a member; or (ii) is otherwise prejudicial to the petitioner as a member.

Essentially the above elements relates to finding of facts.

[5] It is pertinent to note in the instant case that (a) the appellant's petition in the High Court is doomed to be a failure at least for two reasons. They are as follows:

(a) the joint venture agreement which the petitioner relies to sustain the complaints throughout the petition under s 181 of the CA 1965 is a non-starter as the JV ceased to bind the parties upon HICOM, one of the original share holders who had transferred the shares to the first respondent and/or their nominee(s) with the consent and approval of the petitioner and that consent was sustained not only in the seventh board meeting but also eighth. This is also, inter alia, finding of the learned judge; and

(b) before the presenting of the petition there is evidence to show that the petitioner has filed a writ action seeking for specific performance of the purchase of its shares by the first respondent for 1 million British Pounds pursuant to an agreement. That writ was struck out without being served. Subsequent to the writ the petitioner has filed the petition to achieve the same purpose as that of the writ. This may attract the jurisprudence relating to collateral purpose and/or conduct and/or bad faith which will tantamount to abuse of process requiring the court to dismiss the petition.

[6] The appeal is bound to fail for two reasons namely:

(a) it is a finding of fact of the learned judge that it was an ordinary case of breakdown in relations and has nothing to do with oppression. Such a finding is fatal to the appellant as it shows that the appellant has not satisfied the threshold requirement under s 181 to seek any relief. The finding of the learned judge is well articulated in the conclusion in a concise manner and reads as follows:

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> In conclusion, it is my finding that, based on the totality of the evidence, facts and the law, I fail to appreciate how it could be contended that there has been a visible departure from the standard of fair dealing or fair play in so far as the respondents' conduct is concerned; or that the affairs of the fourth respondent (Johnson Matthey Sdn Bhd) are being conducted in a manner oppressive to the petitioner, or in disregard of the interests of the petitioner.
>
> In my judgment, all that the first, second and third respondents did was to exercise their rights under the articles and under the Companies Act and to act in the best interest of the fourth respondent.
>
> I accept the respondents' submission that the dispute between the petitioner and the respondents was a result of the JVA not working out as expected by the parties. It is, as rightly pointed out by the learned counsel for the respondents, an ordinary case of a breakdown in relations and has nothing to do with oppression.

(b) it is trite that finding of facts that too physical facts will not be ordinarily disturbed unless the High Court is plainly wrong and/or the decision is perverse, (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650).

[7] Learned counsel for the appellant accepts the proposition and in support of its contention relies on the following cases:

(a) *UEM Group v Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785;

(b) *Arab-Malaysian Finance Bhd v Steven Phua Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; and

(c) *Re Cumana Ltd* [1986] BCLC 430.

And argues that the finding of facts of the learned judge were misconceived, based on lack of judicial appreciation of the facts and the law, and accordingly, plainly wrong.

[8] We must say here that the lack of judicial appreciation operating from facts relating to s 181 petition does not mean the fact that the learned judge has accepted the evidence favouring the respondents contention and had rejected the appellant's version is a ground for judicial interference on the grounds it was plainly wrong. We must say that as long as the relevant issues have been placed before the learned judge and the judgment reflects that the learned judge has taken cognisance of the relevant issues notwithstanding the judgment does not deal with every aspect of the evidence in detail or meticulous detail, and the learned judge has directed his mind to the relevant issues, and had acted in accordance with the law and the decision passes the test of reasonableness, the finding of facts relating to physical facts will not be ordinarily disturbed notwithstanding the judgment is brief and direct to the point, (see *Damusa Sdn*

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Bhd v MRCB Prasarana Sdn Bhd (Civil Appeal No J-02(NCVC)(W)-963–05 of 2012)). It will not be in order to entertain an appeal on the allegation of finding facts (oppression) because of the assertion that there was lack of judicial appreciation anchored with argument that the decision was plainly wrong with a view to make a rear entry to the well established principle on judicial restraint on finding of facts: in the pretext that the decision is plainly wrong or perverse for lack of judicial appreciation when the issues has been dealt with by the High Court.

BRIEF FACTS

[9] The brief facts of the case has been well articulated by the learned judge and we do not wish to repeat save as to summarise as follows:

(a) the first respondent a well established organisation wanted to set up business in Malaysia and for this prupose approached HICOM Bhd;

(b) HICOM Bhd agreed for a joint venture and wanted a person named Lee Jee Ba to be part of the joint venture, who subsequently entered into the joint venture as a company who is now the petitioner, even though the first respondent did not see any need to have any other entity other than HICOM Bhd to be its joint venture partner;

(c) a joint venture agreement ('JV') was entered into on 17 June 1994 and in consequence the fourth respondent was established in respect of the JV;

(d) one of the articles states that parties agrees to restrain from doing certain things contrary to the JV agreement as long as the first respondent, HICOM and the appellant or their respective subsidiary companies continued to be the registered holders of any shares;

(e) with the consent of the petitioner the shares of the respondent was transferred to the first respondent and/or nominee(s);

(f) the second and third respondent are the nominees of the first respondent;

(g) dispute arose between the appellant and the first respondent when the appellant was not agreeable to increase in the share capital to assist the fourth respondent which needed financial support to operate;

(h) the position the appellant took was it can be done by bank borrowing;

(i) the first respondent says loan facilities could not be obtained without their guarantees;

(j) the appellant complaints that subsequent increase of the share holding has placed their position in disadvantage and is not within the spirit and intent of the JV agreement. Offers to purchase the shares was also not acted upon by the appellant;

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(k) the appellant had put forward numerous complaints to succeed under s 181 of the CA 1965;

(l) the learned judge was candid to state that he wanted to deal in the judgment six issues and that does not mean the learned judge had not taken cognisance of the other issues which he has not deliberated in the judgment; and

(m) the six issues are as follows:

(i) that the transfer of shares from HICOM to the second and third respondents was in breach of the JVA and the articles of association of the fourth respondent;

(ii) that the motions passed at the EGM of 16 April 1998 for the increase in capital and the amendments of the article were in breach of the JVA and the articles; for, by reason of article 58, without the presence of the petitioner at the EGM, there was no quorum;

(iii) that the motions passed at the EGM of 16 April 1998 and the ninth board meeting (held immediately after the EGM) for the increase in capital and the amendment of the article breached article 74 of the articles;

(iv) that the increase in capital was not favourable to the petitioner;

(v) that the petitioner's shareholding in the fourth respondent has been diluted from 20% to 8%; and

(vi) that the non appointment of the petitioner's representatives to the board of the fourth respondent at the AGM on 10 July 1998 breached the JVA and the original articles.

[10] We have read the appeal record and the submission of the respective learned counsel. We are grateful to the comprehensive submission. We do not wish to repeat the same save as to deal with the core issues. After having given much consideration to the submission of learned counsel for the appellant we take the view that the appeal must be dismissed. Our reasons, inter alia, as follows:

(a) in the instant case the judgment of the learned judge clearly demonstrates that the learned judge has taken cognisance of the relevant and material issues and had dealt with it meticulously and have come to a finding that a case under s 181 has not been made out;

(b) much was said about the JV agreement and the manner the learned judge dealt with the construction of various terms. In our view taking the conduct of the appellant and the fact that financial support was required to continue with the business of the fourth respondent, *with or without the JV agreement*, a case under s 181 could not be sustained. (Emphasis

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added.) In *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Bing Sung* [1978] 2 MLJ 227 (PC) (refd), the Privy Council explained that for s 181 of the CA 1965 to be applicable, the petitioner must prove 'oppression' or disregard, that is to say: (i) there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play; or (ii) an awareness of the interest and a conscious decision to override it or brush aside that interest. In *HW Thomas Ltd, Re* [1984] 2 ACLC 610, CA (refd), the New Zealand Court of Appeal held that the terms 'oppressive', 'unfairly discriminatory or unfairly prejudicial' were not to be regarded as three distinct alternatives which are to be considered separately in watertight compartments. They were to be read together. The court further held that question of the fairness or otherwise of the company's financial management had to be examined against the background of the company and reasonable expectations of its members and not simply from the applicant's point of view. This involved the balancing of the conflicting interests of the different groups within the company to see if there was a 'visible departure from the standards of fair dealing', (see *See Hua Realty Bhd v See Hua News Holding Sdn Bhd & Ors* [2007] 7 MLJ 525, HC (refd));

(c) it is also well settled that the shareholders rights to deal with or vote their shares are separate from the rights of the company as a corporate entity and shareholders relationships with it. In *Unisoft Group Ltd (No 3), Re* [1994] 1 BCLC 609, Ch D (refd), Harman J at p 623 had this to say:

> It is important to remember that shareholders' rights to deal with or vote their shares are separate from the rights of the company as a corporate entity and share holders' relationships with it. Shareholders are entitled to sell their shares, to vote their shares, to take any course they like in general meeting without regard to any other person's rights or position. In my judgment the law is that a shareholder may act with malice in voting his shares against a particular resolution and there can be no objection to that, just as in *Bradford Corp v Pickles* [1985] AC 587, a landowner acted on his own land with malicious intent to harm his neighbor, but was not in breach of any legal obligation ….
>
> In my judgment, it is vitally important to hold that shareholders' disputes concerning dealings with their shares are not the same as unfair conduct of the company's business. Shareholders must be kept distinct from the company as far as their private position as shareholders is concerned.
>
> It is of course obvious that a company may act or conduct itself in a manner affecting a shareholder's rights in respect of his shares, for example the board may refuse to sanction a transfer of shares for improper reasons. The action of the board is conduct of the affairs of the company and so, if damage is alleged, may raise the ground of 'unfair' prejudice, and a petition under s 459 (of the UK Companies Act 1985) may be presented to the court. Further, a shareholder by exercising his own private right to vote his shares may cause the

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> company to act by the passing of some resolution in general meeting, in matter alleged to be unfairly prejudicial to some members. Again it is not the act of the shareholder in voting that will found a petition but the result of that act if it produces action, or inaction, the company. In my judgment the vital distinction between acts or conduct of the company and the acts or conduct of the shareholder in his private capacity must be kept clear. The first type of act will found a petition under s 459; the second type will not.
>
> It is only when a shareholder is affected qua member of the company by the company's action which causes damage that s 459 comes into operation. There is a clear and important distinction, in my judgment, to be drawn between actions by shareholders affecting other shareholders directly and actions by the company affecting shareholders ….

(See *Dato' Ting Check Sii v Galaxy Grip Sdn Bhd & Ors* [2007] 7 MLJ 594);

(d) in the instant case it was canvassed to say evidence was led to show reasonable offers were made for the appellant to exit. There are number of authorities to suggest that a refusal to accept a reasonable offer would result in dismissal of the petition even if there is unfairness. It all depends on the facts and circumstances of the case, (see *Re a Company* [1986] BCLC 362; *Re a Company (No 006834 of 1988)*, *ex parte Kremer* [1989] BCLC 365); and

(e) we have carefully examined the complaints, the evidence and the judgment. We are satisfied taking into consideration the totality of the evidence and the conduct of the appellant the learned judge has not misdirected as averred in the memorandum of appeal to justify appellate intervention. In the instant case, we are satisfied that the learned judge has directed his mind to the relevant issues and had acted in accordance with the law and the decision passes the acid test of reasonableness.

[11] In conclusion we find the appeal has no merits. Accordingly, we dismiss the appeal with costs. The appellant to pay the first to third respondent costs in the sum of RM50,000 and the fourth respondents RM25,000.

[12] We hereby order so.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor